

# UNSHACKLING ADDICTION: A PUBLIC HEALTH APPROACH TO DRUG USE DURING PREGNANCY

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## INTRODUCTION

In December 2006, Rennie Gibbs, a black sixteen-year-old addicted to cocaine, lost her baby at thirty-six weeks due to a stillbirth.<sup>1</sup> These facts alone describe a public health tragedy involving fetal death,<sup>2</sup> teenage pregnancy, and drug addiction. However, this situation worsened when Rennie Gibbs was then arrested for murder.<sup>3</sup> Although there was no evidence showing that her drug use caused the stillbirth, Mississippi prosecutors charged Rennie Gibbs with depraved heart murder due to her cocaine use during pregnancy.<sup>4</sup> Scientists, however, have found that determining the cause of stillbirth is difficult.<sup>5</sup> Therefore, as many as half of stillbirths have no known cause.<sup>6</sup> Medical studies show that even in cases where a woman tests positive for cocaine, it is extremely difficult to establish that such use caused the stillbirth due to the variety of factors that may contribute to stillbirth.<sup>7</sup> Despite this difficulty, the prosecutors are pursuing this charge.<sup>8</sup> Although she was a minor at the time of the stillbirth, Gibbs was charged as an adult, and her case will be heard in

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1. Ed Pilkington, *Outcry In America As Pregnant Women Who Lose Babies Face Murder Charges*, GUARDIAN, June 24, 2011, <http://www.guardian.co.uk/world/2011/jun/24/america-pregnant-women-murder-charges>.

2. A stillbirth refers to fetal death at twenty weeks gestation. Linda C. Fentiman, *Rethinking Addiction: Drugs, Deterrence, and the Neuroscience Revolution*, 14 U. PA. J.L. & SOC. CHANGE 233, 240 n.35 (2011) [hereinafter Fentiman, *Rethinking Addiction*] (citing Michael B. Brimacombe et al., *Comparison of Fetal Demise Case Series Drawn from Socioeconomically Distinct Counties in New Jersey*, 26 FETAL & PEDIATRIC PATHOLOGY 213, 213-14 (2007)).

3. Pilkington, *supra* note 1.

4. *Id.* Gibbs was charged with depraved-heart murder under section 97-3-19(1)(b) of the Mississippi Code, which provides:

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

....

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual.

MISS. CODE ANN. § 97-3-19(1)(b) (2006).

5. Some factors associated with stillbirth include poverty, lack of prenatal care, and low levels of maternal education. See Fentiman, *Rethinking Addiction*, *supra* note 2, at 240 n.35.

6. *Id.*

7. See T.A. Campbell & K.A. Collins, *Pediatric Toxicologic Deaths: A 10-Year Retrospective Study*, 22 AM. J. FORENSIC MED. & PATHOLOGY 184, 187 (2001), available at [http://journals.lww.com/amjforensicmedicine/Fulltext/2001/06000/Pediatric\\_Toxicologic\\_Deaths\\_A\\_10\\_Year.15.aspx](http://journals.lww.com/amjforensicmedicine/Fulltext/2001/06000/Pediatric_Toxicologic_Deaths_A_10_Year.15.aspx). This ten year study found that in "eight neonatal and fetal deaths with maternal histories of cocaine use . . . five victims showed positive but nonlethal toxicology results for cocaine or metabolites." *Id.* Upon autopsy, all five of these deaths were ruled either natural or undetermined. *Id.* The study concludes by finding that "[c]ocaine appears to be contributory in many fetal and neonatal deaths in which the mother uses cocaine. [However, t]he direct cause and effect is still under much investigation." *Id.*

8. Pilkington, *supra* note 1.

December 2011.<sup>9</sup> If convicted, Rennie Gibbs will face a mandatory life sentence.<sup>10</sup> While this is the first case in Mississippi where a pregnant woman (or girl in this case) has been charged with murder due to a stillbirth, similar prosecutions have occurred in other states.<sup>11</sup> Cases such as this are far from uncommon.

In the last three decades, state prosecutors have dealt with the problem of drug use during pregnancy as a criminal rather than a public health or medical issue.<sup>12</sup> Such a policy disadvantages pregnant women who are drug addicts.<sup>13</sup> Addiction is defined as “a chronically relapsing [disorder] characterized by compulsive drug taking, an inability to limit the intake of drugs, and the emergence of a withdrawal syndrome during cessation of drug taking (dependence).”<sup>14</sup> Numerous experts have written about the need to cease prosecutions of drug dependent women based on their addictions.<sup>15</sup> Despite this, rather than dealing with this issue as a medical issue focusing on treatment of the pregnant mother or as a public health crisis aimed at prevention and harm reduction, states have largely treated this issue as a criminal law problem for the last several decades.<sup>16</sup> Medical and public health consensus is that this is not the proper approach to this issue. However, women continue to be arrested for drug use during or soon after their pregnancies for political reasons and because

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9. *Id.*

10. *Id.*

11. Linda C. Fentiman, *Pursuing the Perfect Mother: Why America's Criminalization of Maternal Substance Abuse is Not the Answer - A Comparative Legal Analysis*, 15 MICH. J. GENDER & L. 389, 405 (2009) [hereinafter Fentiman, *Perfect Mother*] (noting several cases where women have been charged with homicide due to drug use during their pregnancy).

12. See Krista Stone-Manista, *Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 J. CRIM. L. & CRIMINOLOGY 823, 823-24 (2009).

13. Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 382 (2008).

14. Sana Loue, *The Criminalization of the Addictions: Toward a Unified Approach*, 24 J. LEGAL MED. 281, 282 (2003) (noting that addiction is often referred to as “substance dependence”) (citation omitted).

15. See, e.g., Ehrlich, *supra* note 13, at 382-83; Julie B. Ehrlich & Lynn M. Paltrow, *Jailing Pregnant Women Raises Health Risks*, WOMEN'S ENEWS, Sept. 20, 2006, available at <http://www.womensenews.org/story/health/060920/jailing-pregnant-women-raises-health-risks>.

16. Stone-Manista, *supra* note 12, at 823-24. Most of the convictions of pregnant women under child endangerment statutes have been overturned based on the lack of the inclusion of a fetus in the child endangerment statutes or because of judges holding that drugs cannot be delivered through an umbilical cord. Fentiman, *Perfect Mother*, *supra* note 11, at 399. In fact, South Carolina is the only state that has upheld such convictions. *Id.* (citing *Whitner v. South Carolina*, 492 S.E.2d 777, 789-90 (S.C. 1995), *cert. denied*, 523 U.S. 1145 (1998)). However, this has not prevented certain states from continuing to arrest pregnant women. For example, eight women in one Alabama jurisdiction with a population of 37,000 were prosecuted in an eighteen-month period in 2007 and 2008 for drug use during pregnancy. Stone-Manista, *supra* note 12, at 825.

of fears of the health effects of drugs and alcohol during pregnancy<sup>17</sup>—effects which are less severe than previously thought and are still not completely understood.<sup>18</sup> This “war on the fetus” is part of the larger “War on Drugs,” which punishes illicit drug use through the criminal justice system.<sup>19</sup> This model sees illicit drug use as a crime that must be punished, rather than as a symptom of the medical problem of addiction.<sup>20</sup>

There is no evidence that dealing with this issue via the criminal justice system does anything to help the fetuses these women are carrying or the babies they bear.<sup>21</sup> Scientists have found that the health effects of using illegal drugs during pregnancy are no more harmful than using alcohol or tobacco, both legal substances.<sup>22</sup> However, an illicit drug-abusing mother is not the most sympathetic of characters and is easily vilified by the public and prosecutors as giving birth to a “crack baby,” or more recently, a “meth baby.” In fact, scientists have noted, there is no such thing as a “crack” or “meth” baby.<sup>23</sup> Regardless of the fact that the scientific basis for these labels has been questioned, judges and prosecutors continue to arrest or jail women due to their drug use during pregnancy.<sup>24</sup> Such criminalization has not created a strong deterrent effect, as the rate of drug use in pregnant woman has remained fairly consistent.<sup>25</sup>

Scholars have written extensively about cases where pregnant women have been arrested due to their substance abuse during pregnancy.<sup>26</sup> Many note the need for a public health, rather than a punitive approach to this problem.<sup>27</sup> This article builds upon these recommendations and attempts to define what

17. Fentiman, *Perfect Mother*, *supra* note 11, at 459 (arguing that because prosecutors are politically accountable, they are more apt to cater to the public’s demand for the prosecution of pregnant mothers).

18. Barry M. Lester et al., *Substance Use During Pregnancy: Time for Policy to Catch up with Research*, 1 HARM REDUCTION J. 5, 6 (2005) (noting that the recent findings suggest neural abnormalities that might occur in humans depends on other factors, which may include genetic vulnerability); *id.* at 31 (“[W]e do not know the long-term developmental effects of prenatal drug exposure per se.”).

19. See Marne L. Lenox, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 285-86 (2011) (noting that the “War on Drugs” was declared by President Richard Nixon in 1971).

20. See Lester et al., *supra* note 18, at 3.

21. Fentiman, *Rethinking Addiction*, *supra* note 2, at 239-41.

22. Susan Okie, *The Epidemic That Wasn’t*, N.Y. TIMES, Jan. 27, 2009, at D1.

23. *Id.*

24. See Stone-Manista, *supra* note 12, at 823-24.

25. In a recent study detailing substance use among women between 2002 and 2007, it appears that the percentage of pregnant women using drugs or alcohol has remained constant. See OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., ALCOHOL USE AMONG PREGNANT WOMEN AND RECENT MOTHERS: 2002 TO 2007 (2008), available at <http://www.oas.samhsa.gov/2k8/pregnantAlc/pregnantAlc.pdf>.

26. See, e.g., Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1741-43 (2008).

27. See, e.g., Fentiman, *Rethinking Addiction*, *supra* note 2, at 237; Stone-Manista, *supra* note 12, at 856.

such an approach entails. While a punitive approach involves judges, prosecutors, and child welfare officials, a public health approach utilizes community partners, prevention programs, and harm reduction efforts. This article argues the benefits of using public health methodologies and approaches to address the issue of substance abuse during pregnancy. Public health as a field attempts to analyze the root causes of a health issue and aid in preventing such problems from occurring in the first place.<sup>28</sup> In the last few decades, states have approached the issue of drug use during pregnancy primarily from a criminal law perspective.<sup>29</sup> The focus has been to identify and punish those who use drugs during their pregnancy. This article argues that the criminal law and punitive focus may adversely affect the health of pregnant women by discouraging women using drugs from seeking prenatal care and even encouraging them to terminate their pregnancies for fear of criminal sanctions. Also, such an approach appears to do nothing to curb drug addiction or drug use during or after pregnancy.<sup>30</sup> This article expounds upon how public health methodologies could be best used to address such drug use and argues that such an approach would be more effective in curbing the problem than the current punitive approach.

Part I of this article outlines a brief history of how pregnant women suffering from drug addiction have been treated by the criminal justice and child welfare system in the United States. This section details cases where women have been arrested or incarcerated when their drug use during pregnancy has been revealed. It also details how prosecutors have used fetal protection laws to punish pregnant women for their drug addictions. Additionally, this Part notes the legislative trend towards removing children from the homes of mothers who have been found to use illegal substances to foster care.

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28. Lawrence O. Gostin, *A Theory and Definition of Public Health Law*, 10 J. HEALTH CARE L. & POL'Y 1, 10 (2007).

29. Stone-Manista, *supra* note 12, at 823-24.

30. See Fentiman, *Perfect Mother*, *supra* note 11, at 462. Linda Fentiman and Lynn Paltrow have written about how the effects of drug use during pregnancy may have been exaggerated in the 1980s and 1990s for politically motivated purposes. See, e.g., LYNN M. PALTROW ET AL., YEAR 2000 OVERVIEW: GOVERNMENTAL RESPONSES TO PREGNANT WOMEN WHO USE ALCOHOL OR OTHER DRUGS (2000), available at [http://advocatesforpregnantwomen.org/file/gov\\_response\\_review.pdf](http://advocatesforpregnantwomen.org/file/gov_response_review.pdf) [hereinafter PALTROW ET AL., YEAR 2000 OVERVIEW]; Linda Fentiman, *The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. U. L. REV. 537 (2006) [hereinafter Fentiman, *New "Fetal Protection"*]; Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999 (1999); Lynn M. Paltrow, *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461 (2005) [hereinafter Paltrow, *Governmental Responses*]. However, regardless of the effect on the fetus, curbing drug addiction is a public health goal worth striving for. Criminalization has not helped achieve this goal. April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 196-97 (2007).

Part II of this article critiques the punitive handling of drug abuse during pregnancy and outlines why a public health approach is preferable. This section first outlines different approaches to handling the problem of drug use during pregnancy and advocates for an approach that minimizes the role of the courts and the criminal justice system. To support this, this section discusses critiques by medical and public health organizations on the criminal treatment of drug use during pregnancy. Then, it provides a bioethical critique of prenatal drug use. Finally, Part II discusses how a criminal approach unfairly targets poor and minority women.

Part III of this article outlines what is needed to achieve a public health law approach to the issue of substance abuse during pregnancy and discusses potential shortcomings of such an approach. This section first defines a public health approach to addressing prenatal drug use. Then it discusses the need for evidence-based policy making and a public health approach that focuses on prevention and harm reduction. This section also utilizes public health ethics to support its contentions. Finally, this section notes the limitations of a public health based approach.

#### I. THE CURRENT PUNITIVE APPROACH TO DRUG USE DURING PREGNANCY: A BRIEF HISTORY

Part I of this article briefly discusses statistics related to drug use in the United States. It then introduces readers to examples of cases where women have been arrested or incarcerated due to their drug use. Although the drug *du jour* may have changed through the years from marijuana to cocaine to heroin to crystal “meth,”<sup>31</sup> drug addiction appears to be as common today as it was twenty years ago in the prime of the “War on Drugs.”<sup>32</sup> The “War on Drugs” meant those convicted of drug offenses faced harsh criminal sanctions, including lengthy jail sentences.<sup>33</sup> In the last several decades, there has been effort to treat drug addiction as a mental illness that demands treatment rather

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31. See Richard A. Rawson et al., *Will the Methamphetamine Problem Go Away?*, 21 J. ADDICTIVE DISEASES 5, 6 (2002).

32. In 1988, the percentage of the American population using illicit drugs in the past month was 7.3 percent. DIV. OF EPIDEMIOLOGY & PREVENTION RESEARCH, NAT’L INST. ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE 34 (1988). In 2009, the percentage of the American population using illicit drugs in the past month was 8.7 percent. OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NATIONAL SURVEY ON DRUG USE AND HEALTH *available at* <http://www.oas.samhsa.gov/NSDUH/2k9NSDUH/2k9ResultsP.pdf> (last visited July 31, 2011).

33. MARC MAUER & RYAN S. KING, SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 1-2 (2007), *available at* [http://www.sentencingproject.org/doc/publications/dp\\_25yearquagmire.pdf](http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf). For example, in Minnesota, a person convicted of possessing half an ounce of cocaine can spend as much as eighty-six months in prison. John Stuart & Robert Sykora, *Minnesota’s Failed Experience with Sentencing Guidelines and the Future of Evidence-Based Sentencing*, 37 WM. MITCHELL L. REV. 426, 429 (2011).

than prison time.<sup>34</sup> An example of this trend was demonstrated in 1994 when the American Psychiatric Association diagnosed drug addiction as a mental disorder.<sup>35</sup> Many advocates of a medical model of addiction point to the inclusion of drug addiction in the DSM-IV as proof that such addiction should be treated as a disease.<sup>36</sup> Regardless of such advocacy, law enforcement is still more heavily funded and utilized than treatment.<sup>37</sup>

Drug addiction affects all segments of the population, including pregnant women. Approximately 5-6 percent of American mothers use illegal drugs during their pregnancy.<sup>38</sup> As with other segments of the population, using criminal punishment as a means of deterring drug use prevails over the option of treatment.<sup>39</sup> Numerous articles and newspaper accounts detail examples of pregnant women being incarcerated or charged with crimes associated with their drug use.<sup>40</sup> Some women have even been charged with crimes only tangentially related to such use. For example, in *United States v. Vaughn*, a pregnant woman who tested positive for cocaine pleaded guilty to second-degree theft, a crime unrelated to her drug use.<sup>41</sup> The judge then sentenced the woman to be imprisoned for the entire length of her pregnancy.<sup>42</sup> Although the judge recognized that the crime the woman was convicted of would typically not be punished with a jail sentence, he nevertheless sentenced her to six months incarceration, stating that he wanted “to be sure she would not be released until her pregnancy was concluded . . . [due to] concern for the unborn child.”<sup>43</sup> This punishment was an attempt to ensure she would not harm her fetus with her drug use.<sup>44</sup>

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34. Ellen M. Weber, *Bridging the Barriers: Public Health Strategies for Expanding Drug Treatment in Communities*, 57 RUTGERS L. REV. 631, 632 n.2 (2005). In fact, some states (including Alabama, Arizona, California, Hawaii, Kansas, New Mexico, Oklahoma, Oregon, and Washington) have instated programs that permit or even mandate the diversion of drug offenders from prisons and jails to treatment. *Id.*

35. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 181 (4th ed. 1994) (defining substance dependence as “[a] maladaptive pattern of substance abuse, leading to clinically significant impairment or distress . . . occurring at any time in the same 12-month period”).

36. See, e.g., Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 729 (2008).

37. Lenox, *supra* note 19, at 285-86 (stating that the Nixon era marks the only time in the history of the war on drugs in which more funding went toward treatment than law enforcement).

38. Fentiman, *Perfect Mother*, *supra* note 11, at 395. This is a hard number to substantiate due to the nature of drug addiction. It is likely that this is an understated percentage as there is some detection bias regarding who gets tested for drug use.

39. Fentiman, *Rethinking Addiction*, *supra* note 2, at 234.

40. See, e.g., Pilkington, *supra* note 1.

41. See Cherry, *supra* note 30, at 172-73.

42. *Id.* at 173.

43. *Id.* (citation omitted).

44. *Id.*

No state has enacted a law that directly criminalizes the conduct of the mother during pregnancy.<sup>45</sup> However, pregnant mothers have still been prosecuted for their actions during their pregnancy through a variety of legal theories. In 1977, Margaret Reyes was indicted on felony child endangerment charges due to her heroin use during pregnancy.<sup>46</sup> Although she was not ultimately prosecuted, she became the first woman in the United States to be indicted for drug use during pregnancy.<sup>47</sup> In the late 1980s and early 1990s, one of the approaches for prosecuting a pregnant mother for causing harm to her fetus through drug use was to convict her of delivering drugs to a minor.<sup>48</sup> Under this approach, pregnant mothers were prosecuted for the delivery of drugs through their umbilical cord.<sup>49</sup> State appellate courts routinely overturned such prosecutions after finding that the legislature did not intend for “minor children” to include fetuses nor could delivery of drugs to a minor be construed to include delivery via the umbilical cord.<sup>50</sup> However, South Carolina has upheld such prosecutions, arguing that the language of “minor children” did in fact include fetuses.<sup>51</sup>

In the late 1990s, prosecutors began taking a different approach—prosecuting the mother for criminal homicide or assault.<sup>52</sup> State homicide and assault laws were originally designed to protect fetuses from harm from someone other than the pregnant mother, such as an abusive partner.<sup>53</sup> These laws, originally intended to bolster women’s rights, were in effect being used to punish women for violations of fetal rights.<sup>54</sup> A typical illustration of this type of arrest occurred in 2003 with Tayshea Aiwohi. Aiwohi was convicted of

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45. CTR. FOR REPRODUCTIVE RIGHTS, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY 2, available at [http://reproductiverights.org/sites/default/files/documents/pub\\_bp\\_punishingwomen.pdf](http://reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf) (last visited July 31, 2011).

46. See Linda C. Fentiman, *In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (And Other Countries Don't)*, 18 COLUM. J. GENDER & L. 647, 648 (2009) [hereinafter Fentiman, *Fetal Protection*] (citing Reyes v. Superior Ct., 141 Cal. Rptr. 912, 912 (Ct. App. 1977), where the California Supreme Court ruled against the prosecution because the legislature did not intend to include “unborn children” within the meaning of the term child).

47. *Id.* Professor Fentiman has written several articles about the ill use of fetal protection statutes to prosecute pregnant women. See, e.g., Fentiman, *New “Fetal Protection”*, *supra* note 30; Fentiman, *Perfect Mother*, *supra* note 11.

48. Fentiman, *Perfect Mother*, *supra* note 11, at 398-99.

49. CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 45; see, e.g., Johnson v. State, 602 So. 2d 1288 (Fla. 1992) (holding that cocaine passing through an umbilical cord, even if occurring after birth, was not contained within the meaning of “delivery” of an illegal drug to a minor within the language of the statute).

50. Fentiman, *Perfect Mother*, *supra* note 11, at 399.

51. Whitner v. South Carolina, 492 S.E.2d 777, 779-80 (S.C. 1995), *cert. denied*, 523 U.S. 1145 (1998).

52. Fentiman, *Perfect Mother*, *supra* note 11, at 400.

53. Carolyn B. Ramsey, *Restructuring the Debate Over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 721-22 (2006).

54. See Cherry, *supra* note 30, at 152-53.



manslaughter because her use of methamphetamines while pregnant allegedly caused the death of her baby two days after the infant's birth.<sup>55</sup> Ultimately, the Hawaii Supreme Court overturned the conviction by holding that at the time of the Aiwahi's conduct, the child was not a person.<sup>56</sup>

Just as in the Rennie Gibbs case discussed earlier, prosecutors have also attempted to directly charge a pregnant mother with murder when her child was stillborn. The first American mother charged under this scheme was Regina McKnight of South Carolina.<sup>57</sup> McKnight was a black, homeless woman, with an IQ of 72, who was addicted to crack cocaine.<sup>58</sup> South Carolina police charged her with "homicide by child abuse."<sup>59</sup> Although her first trial ended in mistrial, she was eventually convicted and sentenced to twenty years in prison, with the South Carolina Supreme Court upholding her conviction.<sup>60</sup> In 2008, after nine years in prison, McKnight was granted post conviction relief on grounds of ineffective assistance of counsel.<sup>61</sup> Each individual case has unique traits, but the common factor is these women are being prosecuted for drug use during pregnancy, rather than being offered treatment options for their drug addiction. In addition, in almost all of these cases, the women involved are poor and often black.<sup>62</sup>

Prosecutors have also demonstrated their creativity in using statutes by prosecuting pregnant mothers through statutes that prohibit the exposure of a child to controlled or chemical substances or drug paraphernalia.<sup>63</sup> For example, section 26-15-3.2 of the Alabama Code prohibits the knowing,

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55. Fentiman, *Perfect Mother*, *supra* note 11, at 403 (citing *State v. Aiwahi*, 123 P.3d 1210, 1210-11 (Haw. 2005)). I say "allegedly" because there is not substantial evidence to show that methamphetamine use has detrimental effects on a fetus. As with other drugs, the fear of the effects is much more substantial than the real effect of such drug use. See Barry Lester, *One Hit of Meth Enough to Cause 'News Defects'*, NATIONAL ADVOCATES FOR PREGNANT WOMEN, Aug. 17, 2005, [http://advocatesforpregnantwomen.org/main/publications/articles\\_and\\_reports/one\\_hit\\_of\\_meth\\_enough\\_to\\_cause\\_news\\_defects.php](http://advocatesforpregnantwomen.org/main/publications/articles_and_reports/one_hit_of_meth_enough_to_cause_news_defects.php).

56. Fentiman, *Perfect Mother*, *supra* note 11, at 403-04.

57. *Id.* at 402 (citing *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003)).

58. *Id.*

59. *Id.* at 402 n.44.

60. *Id.* at 402.

61. *Id.* at 403.

62. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1420-21 (1991) (noting women most often charged with criminal penalties in fetal prosecution cases are poor and black).

63. See Fentiman, *Perfect Mother*, *supra* note 11, at 407-408. Statutes aimed at this behavior have been passed in many states. See ALA. CODE § 26-15-3.2 (2011); ALASKA STAT. § 11.51.110 (2011); DEL. CODE ANN. tit. 11, § 1102 (2011); HAW. REV. STAT. § 709-904 (2011); IDAHO CODE ANN. § 37-2737A (2011); KY. REV. STAT. ANN. § 218A.1441-1443 (LexisNexis 2011); LA. REV. STAT. ANN. § 14:93 (LexisNexis 2011); MINN. STAT. ANN. § 609.378 (West 2011); NEV. REV. STAT. § 453.3325 (2011); N.D. CENT. CODE § 19-03.1-22.2 (2011); OHIO REV. CODE ANN. § 2919.22 (West 2011); OR. REV. STAT. § 163.575 (2011); UTAH CODE ANN. § 76-5-112.5 (2011); WYO. STAT. ANN. § 6-4-405 (2011).

reckless, or intentional exposure of a child to a controlled substance.<sup>64</sup> Violations of this statute are considered a felony, and if the child dies, the crime carries a sentence of ten years to life.<sup>65</sup> Despite clear legislative intent for the statute not to apply to pregnant women—it was originally designed to prosecute parents and others who expose children to methamphetamine labs—Alabama prosecutors in several rural counties have for the last five years prosecuted pregnant women who used drugs.<sup>66</sup>

In addition to illegal drugs, pregnant mothers have also been prosecuted for alcohol use.<sup>67</sup> Approximately 25 percent of pregnant mothers consume alcohol during their pregnancy.<sup>68</sup> Prosecutors have been quick to charge pregnant mothers with harming their fetus with this legal drug as well. In Wisconsin, an alcoholic woman was charged with attempted first-degree intentional homicide and first-degree reckless injury after going into labor in a bar and telling a hospital nurse of her alcoholism.<sup>69</sup> Although the Wisconsin Court of Appeals ultimately ruled that the fetus was not a human being and barred the criminal prosecution,<sup>70</sup> this is yet another example of a criminal, rather than treatment, model. The court ruled that to allow the statute to be used in this way could have illogical results, stating that, “[t]aken to its extreme, prohibitions during pregnancy could also include . . . the failure to secure adequate prenatal medical care, and overzealous behavior, such as excessive exercising or dieting.”<sup>71</sup> This same reasoning could be applied to many prosecutions of women for drug use during pregnancy. Often it is not clear that drug use or alcohol use actually caused harm to the fetus.<sup>72</sup> However, due to the fear of such harm, these women are prosecuted by the criminal justice system.

64. ALA. CODE § 26-15-3.2 (2011).

65. If the exposure causes the death of a child the act is considered a class A felony, § 26-15-3.2(3), and the punishment is imprisonment of a period of time not less than ten years and up to life, ALA. CODE § 13A-5-6(a)(1) (2011).

66. Cassandra Burrows, *Health Experts Warn Alabama Court of Criminal Appeals That Prosecuting Pregnant Women as Drug Labs Is Bad for Babies*, NATIONAL ADVOCATES FOR PREGNANT WOMEN, July 12, 2010, [http://advocatesforpregnantwomen.org/blog/2010/07/health\\_experts\\_warn\\_alabama\\_co.php](http://advocatesforpregnantwomen.org/blog/2010/07/health_experts_warn_alabama_co.php).

67. Cherry, *supra* note 30, at 147-48.

68. Fentiman, *Perfect Mother*, *supra* note 11, at 395.

69. *Id.* at 400; see also Erin N. Linder, *Punishing Prenatal Alcohol Abuse: The Problems Inherent in Utilizing Civil Commitment to Address Addiction*, 2005 U. ILL. L. REV. 873, 885-96 (outlining the history of civil commitment laws in Wisconsin and the constitutional problems with these laws). Several pregnant women have been arrested and imprisoned for drug use during pregnancy based on fetal rights and the desire to protect fetuses from harm based on the mother's drug use.

70. Fentiman, *Perfect Mother*, *supra* note 11, at 400.

71. *Id.* at 401 (quoting *State v. Deborah J.Z.*, 596 N.W.2d 490, 494-95 (Wis. Ct. App. 1999)).

72. Many feel that the effects of drug use during pregnancy have been largely exaggerated. See, e.g., Susan Okie, *supra* note 22.

Without proof of causation, this could be interpreted as a slippery slope, which may limit a pregnant woman's behavior and autonomy.<sup>73</sup>

Overall, in the last twenty-five years, over two hundred mothers in the United States have been prosecuted for causing harm to their fetuses by using drugs while pregnant.<sup>74</sup> This phenomenon is not limited to a few jurisdictions either, as pregnant women in over thirty states have been prosecuted for using alcohol or illegal drugs while pregnant.<sup>75</sup>

Closely related to pure criminal law approaches, several states require physicians and health care professions to report prenatal drug use to law enforcement officials and child protective services.<sup>76</sup> There are several problems with such reporting requirements. First of all, not all women get tested for drug use during pregnancy.<sup>77</sup> Often, poor minority women are tested at a higher rate than white, middle, and upper-class women.<sup>78</sup> Further, there are concerns about how this affects the physician's relationship with the patient.<sup>79</sup>

In addition, many states have legislation that regards a positive drug test or other evidence of prenatal drug exposure as prima facie evidence of child abuse or neglect.<sup>80</sup> Such evidence often leads to a woman's newborn and existing children being placed in foster care. In addition to the fear of incarceration, it is argued that women with addiction issues fail to seek prenatal care or disclose their addiction due to fears of their children being taken away from them.<sup>81</sup> Such fears are founded in reality as thousands of women have had their children taken away from them on the basis of a positive drug test.<sup>82</sup>

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73. Another related problem is that often these arrests are based on one drug test, which may be unreliable. See Troy Anderson, *False Positives are Common in Drug Tests on New Moms*, L.A. DAILY NEWS, Jun. 28, 2008, <http://www.mapinc.org/drugnews/v08/n631/a06.html>.

74. Mary E. Reynolds, *Under the Influence: Policy Approaches to Substance Abuse During Pregnancy*, 7 PRAXIS 16, 16 (2007), available at [http://www.luc.edu/socialwork/praxis/pdfs/vol7\\_chapter2.pdf](http://www.luc.edu/socialwork/praxis/pdfs/vol7_chapter2.pdf).

75. Fentiman, *Fetal Protection*, *supra* note 46, at 648.

76. Cynthia Dailard & Elizabeth Nash, *State Responses to Substance Abuse among Pregnant Women*, GUTTMACHER REPORT ON PUB. POL'Y, Dec. 2000, at 3-4, available at <http://www.guttmacher.org/pubs/tgr/03/6/gr030603.pdf>.

77. Reynolds, *supra* note 74, at 18.

78. *Id.*

79. See *infra* notes 105 and 106 and accompanying text outlining a bioethical analysis of such reporting.

80. Jean Reith Schroedel & Pamela Fiber, *Punitive Versus Public Health Oriented Responses to Drug Use by Pregnant Women*, 1 YALE J. HEALTH POL'Y & ETHICS 217, 222 (2001).

81. Dailard & Nash, *supra* note 76, at 5-6.

82. Paltrow, *Governmental Responses*, *supra* note 30, at 482.

Even some laws that espouse a public health approach do not seem to protect against this. For example, Oregon law states that:

If during routine pregnancy or prenatal care, the attending health care provider determines that the patient uses or abuses drugs or alcohol or uses unlawful controlled substances, or the patient admits such use to the provider, it is the policy of this state that the provider encourage and facilitate counseling, drug therapy and other assistance to the patient in order to avoid having the child, when born, become subject to protective services.<sup>83</sup>

Though this provision seems to advocate counseling and treatment, it is silent about how such evidence would be viewed by child protective services.<sup>84</sup>

Some states, such as California, take a public health approach towards a pregnant woman's positive drug test. According to California law,

A positive toxicology screen at the time of the delivery of an infant is not in and of itself a sufficient basis for reporting child abuse or neglect. However, any indication of maternal substance abuse shall lead to an assessment of the needs of the mother and child . . .<sup>85</sup>

California's provision requires evidence of more than a positive drug test to determine whether there is child abuse and neglect. Additionally, if there is neglect "due to the inability of the parent to provide the child with regular care due to the parent's substance abuse," the statute specifies that such report should be made to child welfare authorities, not law enforcement.<sup>86</sup> Provisions such as California's are unique. However, under a public health approach, such legislation is needed in each state.

## II. CRITIQUES OF THE CRIMINALIZATION APPROACH TO SUBSTANCE ABUSE DURING PREGNANCY AND THE NEED FOR A PUBLIC HEALTH BASED APPROACH

Punishing pregnant women for their addictions by arresting them does nothing to curb drug or alcohol addiction or protect the fetus. Section A of this Part critiques the criminalization of drug abuse during pregnancy and advocates for an approach that requires public health, rather than criminal law, intervention. Section B discusses the consensus in the medical and public health communities that locking up pregnant drug users is counterproductive. Section C introduces a bioethical critique of the criminalization of drug use during pregnancy. It analyzes the issue as a medical one and warns that a pregnant woman who abuses drugs or alcohol may be reluctant to carry her pregnancy to term or seek prenatal care if she is afraid she will be arrested due

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83. OR. REV. STAT. § 430.915 (2011).

84. *Id.*

85. CAL. PENAL CODE § 11165.13 (West 2011).

86. *Id.*

to her drug use. Section C also notes the greater risks to the fetus due to lack of prenatal care than to illegal drug use during pregnancy. Section D details how enforcement of drug testing and reporting seems to unfairly harm poor, minority, urban women.

*A. Why Pregnant Drug Users Need Public Health Support, Not Criminal Sanctions*

In the United States, states have taken various approaches to the issue of drug use during pregnancy. Common approaches include incarceration, confinement, detention, or treatment.<sup>87</sup> America's "War on Drugs" has emphasized law enforcement, arrest, prosecution, and imprisonment.<sup>88</sup> If we are serious about combating drug use amongst pregnant women, we cannot focus on punitive measures such as confinement and detention. Punishment alone does nothing to further the goal of reducing such drug use. It also ignores the reality that women do not abuse drugs in a vacuum. There are a variety of societal factors, such as poverty, domestic violence, lack of social support and education, related to drug use.<sup>89</sup> Additionally, after a woman is already addicted to drugs, she may not just will herself to stop even if she is pregnant. Women need access to effective treatment options to properly overcome their addictions. Without addressing these societal factors, a criminal model fails in helping the woman or her baby. A public health model is broader in scope and addresses these concerns.<sup>90</sup>

The purpose of this article is to introduce to a legal audience what a public health approach may entail. For a public health approach to work, pregnant women cannot continue to face the risk that they will be arrested, committed, incarcerated, confined, or otherwise detained due to drug use during pregnancy.<sup>91</sup> The legal community needs to follow the advice of the medical and public health community for this approach to work. If drug use during pregnancy were discovered, a public health model would utilize treatment and harm reduction efforts, not criminal penalties.

This article does not advocate the decriminalization of all drug use. However, in the context of drug use during pregnancy, women cannot continue to be criminally targeted merely for being drug addicts. In *Robinson v. California*, the Supreme Court held that it was unconstitutional to criminalize the status of addiction.<sup>92</sup> In fact, Justice Douglas wrote in his concurrence that treating a drug addict as a criminal merely due to his or her addiction amounts to "cruel and unusual punishment."<sup>93</sup> Despite such guidance, prosecutors and judges have used law in creative ways to do just that—punish a woman for

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87. PALTROW ET AL., YEAR 2000 OVERVIEW, *supra* note 30, at 1, 3.

88. Lester et al., *supra* note 18, at 3.

89. Reynolds, *supra* note 74, at 21.

90. *Id.* at 21-22.

91. See Paltrow, *Governmental Responses*, *supra* note 30, at 495.

92. *Robinson v. California*, 370 U.S. 660, 667 (1962).

93. *Id.* at 668.

becoming pregnant when she is addicted to drugs. For a public health approach to work, this type of punitive measure cannot exist.

Additionally, the punitive approach is not grounded in science. Legal drugs, such as tobacco and alcohol, have been shown to have much greater risk to the fetus than illegal drugs such as cocaine.<sup>94</sup> However, a criminal law approach ignores such harms. A public health approach addresses educating women about all of the risks associated with use of illicit and legal drugs during pregnancy. This helps protect fetal health better than the criminal law model. Additionally, a punitive approach discourages pregnant women to seek treatment for their drug use. For example, the South Carolina Association of Alcoholism and Drug Abuse Counselors reported that when South Carolina began aggressively prosecuting women who used drugs during pregnancy, there was an 80 percent reduction in admissions of pregnant women into drug treatment programs.<sup>95</sup>

#### *B. Critiques By Medical and Public Health Organizations*

For the last two decades, prominent medical organizations have criticized the practice of the criminalization of addiction in pregnant mothers. The American Medical Association has said that “[p]regnant women will be likely to avoid seeking prenatal or open medical care for fear that their physician’s knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.”<sup>96</sup> Also troubled that criminalization will result in lack of prenatal treatment, the American Academy of Pediatrics has said that arresting drug addicted women who become pregnant “may discourage mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment.”<sup>97</sup>

The American Public Health Association has echoed these sentiments, stating “women who might want medical care for themselves and their babies may not feel free to seek treatment because of fear of criminal prosecution related to illicit drug use.”<sup>98</sup> The American College of Obstetricians and Gynecologists has also chastised this practice, saying that “punitive approaches [to maternal behavior] threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their

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94. Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 J. AM. MED. ASS’N 1613, 1621-1624 (2001) [hereinafter Frank et al., *Systematic Review*].

95. See Dailard & Nash, *supra* note 76, at 6.

96. Am. Med. Ass’n Bd. of Trustees, *Legal Interventions During Pregnancy*, 264 J. AM. MED. ASS’N 2663, 2667 (1990).

97. Comm. on Substance Abuse, Am. Acad. of Pediatrics, *Drug Exposed Infants*, 86 PEDIATRICS 639, 641 (1990).

98. Am. Pub. Health Ass’n, *Illicit Drug Use by Pregnant Women, Policy Statement No. 9020*, 8 AM. J. PUB. HEALTH 240 (1990).

fetuses.”<sup>99</sup> These medical and public health organizations recognize the counterproductive nature of criminal sanctions for what is a public health problem.

### C. Critique Based Upon Bioethical Principles

Applying bioethical principles to situations where women are using drugs during pregnancy also demonstrates the detriment of requiring physicians to police and report such use. A bioethical analysis helps highlight the error of submerging the rights of a pregnant woman in favor of the rights of a fetus as a victim in the criminal justice system.<sup>100</sup> In addition to the prosecutions discussed earlier, some states require health care providers to directly report a pregnant woman’s drug or even alcohol use when a fetus appears to have been harmed by the actions of the mother. For example, a Wisconsin statute allows in some instances, and requires in others, physicians and other health care professionals to disclose confidential medical information about the mother without first seeking her consent when the physician feels that any physical injury to a fetus was caused by the use of alcohol or controlled substances.<sup>101</sup> Such laws have effectively turned health care providers into state agents,<sup>102</sup> and the information reported has been used to involuntarily confine pregnant mothers, who may or may not receive actual treatment.<sup>103</sup>

One of the common fears expressed by addicted women is that their health care provider will report their drug use to their local department of child and family services, who will place them in jail and their newborns and any older children into the foster care system.<sup>104</sup> Therefore, studies have shown that addicted women actively hide their drug use habits from their health care provider.<sup>105</sup> This is counterproductive both for the woman and her fetus. When a patient trusts her physician, she is more likely to reveal her continuing drug use or other personal issues she may be facing, such as domestic violence. Reporting requirements can jeopardize the doctor-patient relationship and may raise some bioethical concerns.<sup>106</sup> Autonomy, beneficence, nonmaleficence, and

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99. Comm. on Ethics, Am. College of Obstetrics & Gynecology, *Committee Opinion 321 Maternal Decision Making, Ethics and the Law*, 106 OBSTETRICS & GYNECOLOGY 1127 (2005).

100. Cherry, *supra* note 30, at 165.

101. *Id.* at 166-67 (citing WIS. STAT. § 905.04(4)(e)(3) (2006)).

102. *Id.* at 152 n.19.

103. *Id.* at 169-70. Cherry references one instance where a mother was confined to a locked ward with people suffering from eating disorders for several months without receiving any actual treatment for her drug addiction. *Id.* at 170.

104. See NANCY POOLE & BARBARA ISAAC, APPREHENSIONS: BARRIERS TO TREATMENT FOR SUBSTANCE-USING MOTHERS 17 (2001), available at <http://www.hcip-bc.org/readings/documents/apprehensions.pdf>.

105. See, e.g., *id.*

106. See Kristin Pulatie, *The Legality of Drug-Testing Procedures for Pregnant Women*, 10 VIRTUAL MENTOR: AM. MED. ASS’N J. ETHICS 41, 41-43 (2008).

justice have been identified as the most important bioethical principles.<sup>107</sup> This section contends that physicians should consider each of these principles when treating pregnant women who may be facing a drug or alcohol problem.

Autonomy refers to the idea that a physician must respect that her pregnant patient may make her own decisions regarding her body and her prenatal care.<sup>108</sup> A physician should educate a pregnant woman about the health effects of drug and alcohol use on her fetus and attempt to reduce the harm to the fetus by encouraging the woman to lessen or eliminate such use. However, the woman ultimately has the right to decide whether she will continue to use drugs and alcohol during pregnancy, especially when it comes to legal substances.<sup>109</sup> By focusing on optimizing a woman's behavior during pregnancy, we may be going down a slippery slope that could severely curtail pregnant women's autonomy in areas beyond illegal substances.<sup>110</sup> A physician must balance the autonomy concern for the pregnant woman with concerns about the rights of the unborn fetus.

The physician must also heed the principle of nonmaleficence, which refers to the duty to do no harm unto the patient.<sup>111</sup> The reporting of drug use by pregnant women appears to violate this bioethical principle. Although physicians may have such a reporting requirement imposed on them, they also have the responsibility to consider the ill effects of such reporting, such as the arrest of the pregnant woman or new mother, her children being taken away from her, and her distrust of the medical and criminal justice system.<sup>112</sup> One may argue that an obstetrician has a duty of nonmaleficence to two patients—the soon-to-be-born fetus and the mother. Even if this is the case, the obstetrician must properly balance these rights. The health effects of drug use during pregnancy are variable. Some children born to mothers who used drugs during pregnancy show some developmental delays and minor effects in their long-term health.<sup>113</sup> Others develop without any such disadvantages.<sup>114</sup> For pregnant users, fear of reporting may cause more harm to the soon-to-be-born fetus than the drug use itself due to lack of proper nutritional advice and other prenatal care.<sup>115</sup> Additionally, it is more likely for the woman to be harmed in

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107. See generally T.L. Beauchamp & J.F. Childress, *PRINCIPLES OF BIOMEDICAL ETHICS* (4th ed. 1994).

108. *Id.* at 120-21.

109. See Sue Thomas et al., *The Meaning, Status, and Future of Reproductive Autonomy: The Case of Alcohol Use During Pregnancy*, 15 *UCLA WOMEN'S L.J.* 1, 14 n.76 (2006).

110. For example, a pregnant woman's autonomy would be restricted if a physician attempted to restrict her exercise, her diet, or the amount of weight she could gain.

111. Beauchamp & Childress, *supra* note 107, at 189.

112. See Am. Med. Ass'n Bd. of Trustees, *supra* note 96.

113. Janet W. Stevenson & Traci Rieckmann, *Legislating for the Provision of Comprehensive Substance Abuse Treatment Programs for Pregnant and Mothering Women*, 16 *DUKE J. GENDER L. & POL'Y* 315, 316 (2009).

114. Okie, *supra* note 22.

115. Fentiman, *Rethinking Addiction*, *supra* note 2, at 240.



measurable ways by being arrested and having her children put into foster care.<sup>116</sup> Thus, nonmaleficence appears to favor considering the woman's interests over that of her fetus or newborn.

Another bioethical principle that physicians must abide by is beneficence, which means that physicians should do only good unto their patients.<sup>117</sup> If a physician counsels a pregnant woman to seek drug treatment, this would be an example of a physician attempting to be beneficent towards his patient. However, it is difficult to see as beneficent a physician's reporting a woman's drug use to the authorities, if the physician knows that such reporting will likely result in her arrest or incarceration. Even if the physician in question has to consider two patients—the unborn fetus and the pregnant woman—reporting a woman for using drugs during her pregnancy seems to conflict with beneficence.

Finally, the bioethical principle of justice mandates fairness in distribution and aims to achieve social justice.<sup>118</sup> Due to the over-testing and over-reporting of minorities who rely on public assistance,<sup>119</sup> physicians need to be keenly aware of how their own stereotypes may affect their own testing behavior. In order to gain trust, a physician must consider each of these principles when interacting with pregnant women who may be facing addiction issues.

#### *D. Critique Based on Selective Enforcement of Drug Testing and Drug Reporting*

The criminalization of drug use during pregnancy is perhaps most troubling due to the uneven policing of pregnant women. Although studies show drug and alcohol use during pregnancy occurs in similar percentages amongst women of all races, those women arrested for such use are overwhelmingly minority women.<sup>120</sup> Statistics show that “[d]espite the fact that seventy-two percent of regular drug users are white, fifteen-percent are African American, and ten percent are Latino, of those incarcerated in state prisons on drug charges, forty-five percent are African American, twenty-one percent are Latino, and twenty-six percent are white.”<sup>121</sup> Minority drug users who live in urban communities are incarcerated at a much higher rate than drug users in suburban areas.<sup>122</sup> This is in part because physicians working in private

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116. See Sarah C.M. Roberts & Amani Nuru-Jeter, *Women's Perspectives on Screening for Alcohol and Drug Use in Prenatal Care*, 20 WOMEN'S HEALTH ISSUES 193, 194-98 (2010).

117. Beauchamp & Childress, *supra* note 107, at 259-60.

118. See Sidney Dean Watson, *In Search of the Story: Physicians and Charity Care*, 15 ST. LOUIS U. PUB. L. REV. 353, 358 (1996).

119. See *infra* Part III, Section B.

120. Hora & Stalcup, *supra* note 36, at 722.

121. *Id.*

122. Roberts, *supra* note 62, 1432-33. Professor Dorothy Roberts discusses how black women are “the least likely to obtain adequate prenatal care, the most vulnerable to government monitoring, and least able to conform to the white middle-class standard of motherhood. They are therefore the primary targets of government control.” *Id.* at 1422.

hospitals are less likely to test for drug use than physicians in public hospitals.<sup>123</sup> According to a Casey Family Report, both public and private hospitals over-report abuse and neglect among blacks while they under-report maltreatment among Caucasians.<sup>124</sup> Professor Dorothy Roberts has noted that “[t]here is a strong stereotype that black mothers are irresponsible . . . and the entire image of the ‘crack baby’ is that of a black child. So people who have to identify substance-abusing mothers and make decisions about it are influenced by these stereotypes.”<sup>125</sup>

The ill prospects of “crack babies,” who were overwhelmingly perceived as babies born to black, inner-city mothers, were largely exaggerated based on fear.<sup>126</sup> Newspaper headlines such as “Cocaine: A Vicious Assault on a Child,” “Crack’s Toll Among Babies: A Joyless View” and “Studies: Future Bleak for Crack Babies” appear to have been overblown due to fears of the long-term effects of cocaine use during pregnancy.<sup>127</sup> The long-term effects of cocaine exposure on children’s brain development and behavior appear relatively small.<sup>128</sup> Although cocaine is harmful for the fetus, its effects appear to be less severe than those of alcohol and are comparable to those of tobacco, which are both legal substances.<sup>129</sup>

There has been a strong racial component to the drug arrests of pregnant women. It appears that black women were vilified for harming their fetuses due to their crack and cocaine use, despite the lack of scientific data to support such a contention. There are staggering percentages of racial differentials in foster care as well. For example, nearly 90 percent of all children in Los Angeles County’s foster-care system are minorities.<sup>130</sup> While only 10 percent of the county’s general population is black, black children make up nearly 36 percent of all children in the county’s foster-care system.<sup>131</sup> This has led to concern that hospitals are performing the vast majority of drug screening tests<sup>132</sup> on minority pregnant women and removing the children of those who fail the screening

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123. Gina Kolata, *Bias Seen Against Pregnant Addicts*, N.Y. TIMES, July 20, 1990, at A13 (“[P]oor women are more likely to be prosecuted because public hospitals, where poor women go for care, are most vigilant in their drug testing and more likely than private hospitals to report women whose tests show drug use.”).

124. Troy Anderson, *Race Tilt In Foster Care Hit: Hospital Staff More Likely To Screen Minority Mothers*, L.A. DAILY NEWS, June 30, 2008, at A1 [hereinafter Anderson, *Race Tilt*] (discussing that a study published in the *Journal of Women’s Health* found black women and their newborns were one-and-one-half times more likely to be tested for illicit drugs than women of other races).

125. *Id.*

126. Okie, *supra* note 22.

127. *Id.*

128. See Frank et al., *Systematic Review*, *supra* note 94.

129. Pilkington, *supra* note 1.

130. Anderson, *Race Tilt*, *supra* note 124.

131. *Id.*

132. *Id.*

tests into foster care.<sup>133</sup> It has been suggested that such targeting of minorities is purposeful and represents a new eugenics movement.<sup>134</sup>

### III. EXAMINING THIS ISSUE THROUGH A PUBLIC HEALTH LAW LENS

In the last several years, as arrests of pregnant women for drug and alcohol abuse persist, experts in the medical and public health field have called for an end to the criminalization of addiction.<sup>135</sup> Such criminalization has not reduced or prevented drug and alcohol abuse among pregnant women.<sup>136</sup> Public health scholars generally distrust law-enforcement-only based approaches due to the lack of evidence that such approaches change behavior or reduce harm.<sup>137</sup> A public health based approach towards drug use would likely include drug treatment as a necessary complement to such enforcement.<sup>138</sup>

This article contends that a comprehensive public health based approach is needed to address this issue. Although several scholars advocate such an approach,<sup>139</sup> there are no articles in the literature that detail what such an approach entails with regards to addicted pregnant women. This article describes what public health methodologies need to be used to appropriately address the issue of drug use during pregnancy. A public health approach deemphasizes criminal sanctions and focuses on changing societal views and

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133. *Id.*

134. Roberts, *supra* note 62, at 1472. Eugenics refers to the concept that only those who are deemed genetically superior by virtue of their race or lack of disability should be able to reproduce. *Id.* at 1473. In *Buck v. Bell*, Justice Cardozo infamously stated that “three generations of imbeciles are enough” in the context of forced sterilizations of a woman who was deemed mentally feeble. 274 U.S. 200, 207 (1927). Scholars, such as Dorothy Roberts, have drawn parallels between the eugenics movement of the early 1900s and the War on Drugs, especially in the context of pregnant drug users. See generally DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1998).

135. See *supra* notes 96-99 and accompanying text discussing professional recommendations. One of the reasons for this recommendation is due to the acceptance in medical and public health circles that addiction is a mental disease that should not be stigmatized, but that instead should be treated as any other mental disease. In fact, scientific evidence suggests that drugs create lasting changes in the brain that are responsible for distorting a user’s cognitive and emotional functioning. See Ellen M. Weber, *Bridging the Barriers: Public Health Strategies for Expanding Drug Treatment in Communities*, 57 RUTGERS L. REV. 631, 638-39 (2005) (“Twenty years of scientific research . . . has convinced the majority of the biomedical community . . . that addiction is a brain disease: a condition caused by persistent changes in brain structure and function.”).

136. See Fentiman, *Perfect Mother*, *supra* at note 11, at 462.

137. See, e.g., Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 468 (2007) (noting that passing laws regarding risky HIV behavior does not influence people’s normative beliefs about such risky behavior).

138. See NAT’L CONFERENCE OF STATE LEGISLATURES, *ONLINE SENTENCING AND CORRECTIONS POLICY UPDATES 3* (2010) (describing how state efforts to curb substance abuse include both criminal sanctions and drug treatment), available at <http://ncsl.org/portals/1/Documents/cj/bulletinFeb-2010.pdf>.

139. See, e.g., Fentiman, *Rethinking Addiction*, *supra* note 2, at 269-70.

behaviors.<sup>140</sup> Looking at this issue through a public health lens focuses on prevention or harm reduction rather than simply punishment.<sup>141</sup> Additionally, examining this issue through a public health lens allows one to identify and confront the underlying causes of drug use by pregnant women.<sup>142</sup>

This Part will define a public health approach and detail how such an approach, with its emphasis on prevention and harm reduction, may be implemented. It will also apply public health ethics to the issue of drug use during pregnancy to show the benefits of a public health approach. Finally, this Part will address potential shortcomings of a public health based approach.

#### A. *Defining A Public Health Approach*

Before delving into public health methodologies, it is important to define them. Public health scholars focus on differences in health between populations, rather than individuals. Social epidemiology is an important public health tool that focuses on how social determinants, such as socioeconomic status, affect health.<sup>143</sup> A public health law lens requires taking a structural approach to health that identifies the population-based factors that may influence health, rather than focusing on an individual's personal behavior.<sup>144</sup> Applying the public health tool of social epidemiology to the issue of drug use during pregnancy would require us to systematically examine whether factors such as women's economic backgrounds, insurance status, access to health care, access to child care, access to social services and drug treatment, access to prenatal care and education, family and community support structures, or education level correlate to a likelihood of abusing drugs and alcohol in general and during pregnancy in particular.

In addition to social epidemiology, this issue may be properly analyzed using population-based legal theory, which emphasizes the key role of

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140. Jonathan Todres, *Moving Upstream: The Merits Of A Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447, 452-53 (2011) (applying public health methodologies to the issue of human trafficking).

141. See PUB. HEALTH AGENCY OF CAN., WHAT WE HAVE LEARNED: KEY CANADIAN FASD AWARENESS CAMPAIGNS 21 (2006), [http://www.phac-aspc.gc.ca/publicat/fasd-ac-etcaf-cs/pdf/fasd-ac-etcaf-cs\\_e.pdf](http://www.phac-aspc.gc.ca/publicat/fasd-ac-etcaf-cs/pdf/fasd-ac-etcaf-cs_e.pdf); Elizabeth E. Coleman & Monica K. Miller, *Assessing Legal Responses To Prenatal Drug Use: Can Therapeutic Responses Produce More Positive Outcomes Than Punitive Responses?*, 20 J.L. & HEALTH 35, 61-63 (2006-07); Luis B. Curet, *Drug Abuse During Pregnancy*, 45 CLINICAL OBSTETRICS & GYNECOLOGY 73, 77 (2002); Lester et al., *supra* note 18, at 26.

142. See PUB. HEALTH AGENCY OF CAN., *supra* note 141, at 21; Coleman & Miller, *supra* note 141, at 61-63; Curet, *supra* note 141, at 77; Lester et al., *supra* note 18, at 26.

143. Lisa F. Berkman & Ichiro Kawachi, *A Historical Framework for Social Epidemiology*, in SOCIAL EPIDEMIOLOGY 3, 3-6 (Lisa F. Berkman & Ichiro Kawachi eds., 2000); see, e.g., Michael Marmot, *Social Determinants of Health Inequalities*, 365 LANCET 1099, 1099 (2005).

144. See Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 71 (1999).

population-based or structural factors in health.<sup>145</sup> Wendy Parmet, a pioneer in the field of public health law, describes public health law as the impact of laws and judicial decisions on the population as a whole, rather than individual parties to a lawsuit.<sup>146</sup> Parmet notes that the promotion and protection of public health is a fundamental objective of the law.<sup>147</sup> Her approach emphasizes the need for empirical and quantitatively based legal studies with the populations affected by certain laws.<sup>148</sup> Such legal studies are missing in the area of the criminal treatment of drug use during pregnancy.<sup>149</sup> Prosecutors continue to arrest women for drug use during pregnancy for violation of fetal protection or similar laws, without the aid of empirical or quantitative studies examining the effects of such methods.<sup>150</sup> In order to enact sound public health policy, it is important to study the impact of laws related to addicted pregnant women, such as fetal protection laws. Systematic evidence-based research is particularly challenging in the context of addicted mothers, due to the stigma associated with drug and alcohol use during pregnancy.

Population-based legal theory also relies upon empirical methods that focus on how the law is actually implemented and how it influences population factors.<sup>151</sup> In this context, it is important to examine whether the use of laws targeting drug use during pregnancy is being directed towards certain segments of the population, such as women who receive public aid or minority women. Using such a lens, the law itself can be thought of as a structural determinant of health and one that can evolve to promote better outcomes.<sup>152</sup> A public health law approach would require empirical studies to be designed and conducted to determine how the use of certain fetal protection statutes to incarcerate drug-addicted pregnant women affects women's health and prenatal care in general. Similar studies have been conducted in other contexts.<sup>153</sup> A public health law approach would attempt to explore how the laws relating to reporting of drug

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145. See generally WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 1-77 (2009) (discussing the framework of a population-based legal approach).

146. *Id.* at 2.

147. *Id.*

148. *Id.*

149. See Steverson & Rieckmann, *supra* note 113, at 15.

150. See Fentiman, *Rethinking Addiction*, *supra* note 2, at 266.

151. See PARMET, *supra* note 145, at 53-54; see Zita Lazzarini, *Assessing The Public Health Response During And After The Emergency: Lessons From The HIV Epidemic*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 187, 201-203 (2010) (discussing the desirability of empirical studies to link law and behavior).

152. Scott Burris et al., *Integrating Law and Social Epidemiology*, 30 J.L. MED. & ETHICS 510, 510 (2002).

153. Kim M. Blankenship et al., *Black-White Disparities in HIV/AIDS: The Role of Drug Policy and the Corrections System*, 16 J. HEALTH CARE POOR & UNDERSERVED, Nov. 2005, at 140 (examining how drug policy impacts HIV/AIDS).

use and pregnant women are enforced—whether they are enforced fairly or in a way that leads to disparities.<sup>154</sup>

A public health law lens also requires us to examine laws and policies in the social context in which the law works.<sup>155</sup> This includes what people believe about what is legal and how they act upon it.<sup>156</sup> Therefore, even if a woman lives in a jurisdiction that has adopted a public health based approach to drug treatment, if she believes that revealing her drug use would result in her going to jail, the public health based policy has failed. Those affected by public health policies must be educated about their existence if the policies are to have their desired impact.

### *B. The Need For Evidence-Based Policy*

A public health based approach requires evidence-based research to determine what laws and policies are appropriate.<sup>157</sup> There is a need for systematic public health law research in this area.<sup>158</sup> In order to do this, researchers must use a scientific approach that involves defining the issue of drug use during pregnancy. Public health experts must collect demographic information about those who use drugs and alcohol during pregnancy and study what risk factors seem to lead to such behavior.<sup>159</sup> As a first step in any public health law analysis, we would need to determine the incidence of substance abuse during pregnancy in the population of a certain county, state, or geographic region.

Drug use is typically detected by self-reporting, past history, or drug testing.<sup>160</sup> Examples of national databases that are helpful to determine this data are the National Pregnancy and Health Survey and the National Household Survey on Drug Abuse. Both of these databases contain rich data with regards to demographic information. These are good starting points for epidemiological research, but there are many problems with the numbers.<sup>161</sup> Self-reporting has

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154. See PARMET, *supra* note 145, at 1 (describing “salus populi suprema lex” (“the well being of the community is the highest law”) as meaning that attainment of public good was the rationale for civil society).

155. See Susan S. Silbey, *Legal Culture and Legal Consciousness*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8623, 8623 (Neil J. Smelser & Paul B. Baltes eds., 2001).

156. *Id.* at 8624

157. Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL’Y & L. 590, 600 (2005) (examining child maltreatment through a public health lens).

158. See Fentiman, *Rethinking Addiction*, *supra* note 2, at 239-40 (citing the lack of studies in this area).

159. Todres, *supra* note 140, at 470-71 (detailing how evidence-based strategies could be used in human trafficking).

160. Lester et al., *supra* note 18, at 5.

161. Lana Harrison, *The Validity of Self-Reported Drug Use in Survey Research: An Overview and Critique of Research Methods*, in 167 NATIONAL INSTITUTE ON DRUG ABUSE RESEARCH MONOGRAPH 17, 18 (Lana Harrison & Arthur Hughes eds., 1997).

been shown to be an underestimate of true incidence of drug and alcohol use during pregnancy because of the stigma involved with such use.<sup>162</sup> For example, self-reporting has been shown to underestimate cocaine use during pregnancy.<sup>163</sup> Additionally, reporting by health professionals of such use is an inaccurate measure, due to detection bias.<sup>164</sup> Due to racial and cultural stereotypes, a physician may fail to ask a suburban white mother about her drug habits during pregnancy, let alone test her, while the physician may be more likely to ask and test a black pregnant woman living in the inner city.<sup>165</sup> If not all women are tested, the statistics can be misleading and skewed. All of these caveats must be taken into consideration when designing evidence-based studies.

A nuanced analysis is required to truly determine incidence of drug and alcohol use during pregnancy. Public health researchers focus on the causes of the incidence of cases, which focuses on population measures of disease, rather than on causes of the cases themselves, which only measure individual measures of disease.<sup>166</sup> Some public health tools that could be incorporated into evidence-based studies could be public health surveillance, risk group identification, risk factor exploration, and program implementation and evaluation.<sup>167</sup> Public health surveillance refers to the ongoing data collection and interpretation of health data essential to the “planning, implementation, and evaluation of public health practice.”<sup>168</sup> Surveillance in this context would be to identify geographic and demographic patterns of drug and alcohol use among pregnant women. This information would be used to identify high-risk populations and develop programs to help support those populations. Risk group identification would help determine which populations are most at risk for drug use during pregnancy. Risk factor exploration would allow researchers to systematically determine what risk factors are present in order to prevent women from using drugs and reduce the harm from such use.<sup>169</sup>

The most effective study designs will need to be developed by epidemiologists working in this field. This article suggests the need to tie such research studies to health policy and drug policy. We need to determine what the effects of our current drug policy are as it relates to reducing rates of

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162. *Id.*; see also Lester et al., *supra* note 18, at 5 (noting the underestimates of self-reporting of cocaine).

163. Deborah A. Frank et al., *Cocaine Use During Pregnancy: Prevalence and Correlates*, 82 PEDIATRICS 888, 888 (1988) (noting that up to 24 percent of mothers with positive cocaine tests denied using cocaine).

164. See MICHAEL S. KRAMER, CLINICAL EPIDEMIOLOGY AND BIOSTATISTICS 53 (1988).

165. See *supra* Part II, Section D and accompanying notes.

166. See Geoffrey Rose, *Sick Individuals and Sick Populations*, 14 INT'L J. EPIDEMIOLOGY 32, 34–35 (1985).

167. *Id.*

168. World Health Org., Public Health Surveillance, [http://www.who.int/topics/public\\_health\\_surveillance/en/](http://www.who.int/topics/public_health_surveillance/en/) (last visited Nov. 5, 2011).

169. See Rose, *supra* note 166, at 32 (stating that the discovery of risk factors “identif[ies] certain individuals as being more susceptible to disease”).

prenatal drug use. When developing such a study, it would be useful to have data that compares a state or city that has adopted a comprehensive public health based drug policy<sup>170</sup> to a state or city that has focused heavily on criminalization of drug use, especially for pregnant women. States such as South Carolina and Alabama may fall within this latter category.<sup>171</sup> Tracking how drug use rates have changed over a period of time after the adoption of such policies and how the prevalence of drug use among women of childbearing age has changed would be useful tools to determine future policy. Such retrospective studies may help policy makers enact an effective legal and law enforcement approach to drug use in pregnancy.

Additionally, more studies should be designed to test the recommendations of the public health community that criminalizing drug use during pregnancy has negative health consequences on pregnant drug users and their babies due to lack of utilization of prenatal care and lack of drug treatment.<sup>172</sup> Using the results of properly designed studies that are fashioned to minimize bias, public health officials could determine what interventions, such as education campaigns and legislation, may be most effective.

### C. Prevention

Prevention is a key component of any public health based policy.<sup>173</sup> One of the justifications used for criminalizing drug use during pregnancy via fetal protection statutes or similar laws is that the threat of punishment will have a deterrent effect on such drug use.<sup>174</sup> However, there is no evidence to this assumption. Rather, if anything, it appears that the numbers of infants exposed to drugs and alcohol in utero is increasing.<sup>175</sup> Additionally, those who work with pregnant women with addiction issues report that fears of criminalization

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170. For example, Vancouver has decriminalized almost all drug use. It has implemented a citywide drug policy incorporating harm reduction, prevention, treatment, and enforcement. City of Vancouver, Four Pillars Drug Strategy, <http://vancouver.ca/fourpillars/index.htm> (last visited November 4, 2011).

171. See Fentiman, *Fetal Protection*, *supra* note 46, at 661.

172. One potential study could retroactively determine how utilization rates of prenatal care in public clinics vary according to how actively that state or county pursues criminalization of drug use during pregnancy. This could be measured by whether the state has a narrow “fetal protection” statute or regulation that specifically targets drug use by pregnant women. If such a study could show varying rates of prenatal care, it could prove the hypothesis that such prosecution has ill health effects on the babies born to such mothers. One problem with such a study is that it will not be able to measure how many women choose to terminate their pregnancy due to fear of being arrested due to their drug use.

173. Todres, *supra* note 140, at 480.

174. See Fentiman, *Rethinking Addiction*, *supra* note 2, at 239.

175. David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN’S L.J. 243, 244 (2001).



result in these women avoiding prenatal care and lying about their drug use.<sup>176</sup> Furthermore, a criminal-law-based approach only deals with the drug use after it has occurred. This does not make sense from a public health point of view.<sup>177</sup> A public-health-centered approach to this issue focuses on preventing drug and alcohol abuse, especially among women of childbearing age.<sup>178</sup> This method moves from “reacting to [a problem] to a focus on changing the social, behavioral, and environmental factors that cause [the problem].”<sup>179</sup>

In order to identify the root causes of drug and alcohol use amongst pregnant women, it is necessary to examine both individual risk factors for such drug use and the role of societal factors.<sup>180</sup> A key facet of prevention is early intervention and education by schools, community groups, and health care providers.<sup>181</sup> Prevention may include the use of peer programs in elementary and middle schools.<sup>182</sup> Mentoring programs have also been shown to benefit high-risk populations, such as those likely to abuse drugs and alcohol.<sup>183</sup> In fact, one study found that youths with mentors were 46 percent less likely to start using drugs and 27 percent less likely to start using alcohol.<sup>184</sup> The study showed that the effects were even more dramatic amongst minority youth.<sup>185</sup>

Another tool for prevention may be educational campaigns in schools and community-wide about the health, social, and criminal consequences of drug use.<sup>186</sup> Members of law enforcement, prosecutors, and even judges could play a role in educating community members about the criminal consequences of illicit drug use. By focusing on prevention, the hope is that fewer individuals begin to use drugs and, therefore, fewer need to face the criminal justice system.

The public health model can be effectively implemented by state and federal legislatures. At least sixteen states have legislation requiring education

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176. NANCY POOLE, BRITISH COLUMBIA CTR. OF EXCELLENCE FOR WOMEN'S HEALTH, EVALUATION REPORT OF THE SHEWAY PROJECT FOR HIGH-RISK PREGNANT AND PARENTING WOMEN 11-17 (2000), available at <http://www.hcipc-bc.org/readings/documents/shewayreport.pdf>.

177. See Todres, *supra* note 140, at 481 (comparing such an approach to the ludicrous example of government not vaccinating individuals in favor of a policy allowing an infectious disease outbreak to occur and trying to hold responsible parties accountable after the fact).

178. See Fentiman, *Perfect Mother*, *supra* note 11, at 462.

179. Todres, *supra* note 140, at 482 (quoting James A. Mercy et al., *Public Health Policy for Preventing Violence*, HEALTH AFFAIRS, Winter 1991, at 8).

180. *Id.*

181. *Id.*

182. *Id.* at 483.

183. David L. Dubois et al., *Effectiveness of Mentoring Programs for Youth: A Meta-Analytic Review*, 30 AM. J. COMMUNITY PSYCHOL. 157, 189 (2002).

184. JOSEPH P. TIERNEY & JEAN BALDWIN GROSSMAN, PUBLIC/PRIVATE VENTURES, MAKING A DIFFERENCE: AN IMPACT STUDY OF BIG BROTHERS BIG SISTERS 30 (2000), available at [http://www.ppv.org/ppv/publications/assets/111\\_publication.pdf](http://www.ppv.org/ppv/publications/assets/111_publication.pdf).

185. *Id.* at 22.

186. *Id.* at 8.

of women about the ill effects of drug use during pregnancy.<sup>187</sup> Many states have legislation requiring medical providers to inform pregnant women of the adverse effects of drug use on the fetus during pregnancy.<sup>188</sup> As a public health tool, this is of limited use.<sup>189</sup> It does not address the real concern that drug-addicted women are not seeking prenatal care due to fear of punitive sanctions. Such an educational campaign occurs too late. However, other legislative proposals are good models for states to implement. For example, Arizona has legislation that requires middle- and high-school students to be educated on “the nature and harmful effects of alcohol, tobacco, narcotic drugs, marijuana . . . and other dangerous drugs on a human fetus.”<sup>190</sup> Such legislation allows young girls to learn about the dangers of such drug use, hopefully before they become pregnant or use drugs. A public health approach to prevention is bolstered by legislation such as this.

Additionally, a public health approach to prevention requires a comprehensive analysis on what societal, economic, educational, and health policies lead to certain populations being more likely to abuse drugs.<sup>191</sup> More studies linking law enforcement policy towards drug use and outcomes would aid in such analysis. Such an analysis is necessary to address the root causes of drug use in general and among pregnant women specifically. Some states have legislation that requires research to be conducted about substance abuse during pregnancy.<sup>192</sup> This article gives examples of tools that may be used to prevent drug use, but it is only a starting point. The main purpose of this discussion is to demonstrate the importance of focusing on prevention, rather than criminal penalties, when dealing with the complex issue of drug use during pregnancy.

#### D. Harm Reduction

A public health approach to drug use during pregnancy would also focus on harm reduction.<sup>193</sup> Harm reduction refers to the process of reacting to the problem (drug use) once it has occurred and trying to minimize the effects as much as possible.<sup>194</sup> An important facet of harm reduction is accepting drug use as a health or medical issue, rather than a criminal issue.<sup>195</sup> Those who favor a

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187. Schroedel & Fiber, *supra* note 80, at 224.

188. *Id.* at 224-25.

189. *Id.* at 225.

190. ARIZ. REV. STAT. ANN. § 15-712 (2011).

191. It is necessary to examine how various factors, such as the lack of a primary health care provider or the lack of education, help facilitate drug use. See Todres, *supra* note 140, at 485.

192. Schroedel & Fiber, *supra* note 80, at 224.

193. Andrew Tatarsky, *Harm Reduction Psychotherapy: Extending the Reach of Traditional Substance Use Treatment*, 25 J. SUBSTANCE ABUSE TREATMENT 249, 249 (2003), available at [http://www.andrewtatarsky.com/pubs/journalofsubstanceabuse\\_tatarsky\\_2003.pdf](http://www.andrewtatarsky.com/pubs/journalofsubstanceabuse_tatarsky_2003.pdf).

194. *Id.*

195. Joanna N. Erdman, *Access To Information On Safe Abortion: A Harm Reduction and Human Rights Approach*, 34 HARV. J.L. & GENDER 413, 426 (2011) (“Medicalization,

harm reduction approach realize that drug-abusing women need support, treatment, and family friendly policies, not jail time.<sup>196</sup> Scholars have suggested that a harm reduction approach would require judges and law enforcement to stop removing newborn infants and other children from a pregnant substance abuser's custody without other evidence of harm or neglect.<sup>197</sup> Those who abuse drugs may be able to take care of their children better than the foster care system.<sup>198</sup> Allowing a mother to keep custody of her children while seeking treatment may cause more women to seek out treatment.<sup>199</sup> Some states, like California, currently have legislation that states that drug use alone cannot be the basis of a finding of child abuse or neglect.<sup>200</sup> However, this is the exception. Under a harm reduction model, legislation like California's would be required, coupled with treatment opportunities giving mothers a chance to recover from their addiction.

One of the most important facets of a successful harm reduction approach would be availability of appropriate and comprehensive drug treatment.<sup>201</sup> There is a need for more drug treatment programs aimed at pregnant women.<sup>202</sup> Further, there is a need for more women-only drug treatment programs, which have been shown to be more effective.<sup>203</sup> Even when there is a desire to provide treatment to addicted pregnant women, a "cure" may be difficult. Drug

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particularly the shift from crime to health, thus accounts for the strength of harm reduction as a public discourse. With its focus on public health harms and its rational claims to a normatively neutral, pragmatic approach, harm reduction can bring together disparate political and other actors, maximize the appeal of an intervention, and afford political legitimacy to action on an otherwise controversial issue.").

196. Lynn M. Paltrow, *The War on Drugs and the War on Abortion: Some Initial Thoughts on the Connections, Intersections and the Effects*, 28 S.U. L. REV. 201, 216 (2001).

197. Brody & McMillin, *supra* note 175, at 266.

198. See Lester et al., *supra* note 18, at 26.

199. *Id.*

200. Schroedel & Fiber, *supra* note 80, at 223.

201. CAN. CTR. ON SUBSTANCE ABUSE, RESPECT IS KEY TO HELPING PREGNANT WOMEN WITH SUBSTANCE ABUSE PROBLEMS: A CONVERSATION WITH PAM WOODSWORTH 2 (2001), available at <http://www.hcip-bc.org/readings/documents/RespectisKey.pdf> [hereinafter CAN. CTR. ON SUBSTANCE ABUSE, RESPECT IS KEY]. Additionally, rather than "blame the woman who was using and say that the fetus has rights and she needs to be incarcerated and we need to force her into sobriety," it is important to treat pregnant women who may be addicted to drugs or alcohol with respect and dignity. *Id.* A judgmental or punitive approach results in "push[ing] underground all the other women who are using." *Id.* One educator noted that when she approaches the subject of fetal alcohol syndrome (FAS) with the women in her group, she attempts "to eliminate any of the elements of blaming and shaming" so they will continue to come back to their sessions. *Id.*

202. Steverson & Rieckmann, *supra* note 113, at 322-23 (noting that as of 2007, out of 13,648 mental health and substance abuse facilities nationwide, only 1,926 had programs specifically designed for pregnant and postpartum women).

203. *Id.* at 320 ("[A] women-only program is most often preferred because, overall, (1) women in women-only drug abuse treatment programs were more than twice as likely to complete treatment as women in mixed-gender programs and (2) pregnant women in women-only drug abuse treatment programs averaged more days in treatment than did those in mixed-gender programs.").

treatment is a costly, time consuming, and complicated endeavor. In cases of addicted women who are pregnant, barriers to treatment include distrust of the medical community, lack of support systems, and lack of childcare for other children.<sup>204</sup> Advocates in this area note that even when a pregnant woman realizes she needs help for her addiction, she may not seek such treatment because of the concern that her baby or other children will be taken away from her and put into the foster care system.<sup>205</sup>

Treatment must be a viable option for pregnant women. Although women are as likely, if not more likely, as men to suffer from drug addiction, they represent a small fraction of those receiving treatment.<sup>206</sup> One of the reasons for this is likely the lack of childcare at treatment centers.<sup>207</sup> In fact, one survey found that only 0.1 percent of those in treatment had access to childcare services.<sup>208</sup> Many treatment facilities refuse to accept pregnant women due to fears of liability if drug-affected children are born to these women.<sup>209</sup> Legislation that limits such liability may be effective in allowing for more access to such facilities to pregnant women.

One way the legal system has attempted to incorporate drug treatment into the criminal justice system is by utilizing “drug courts.”<sup>210</sup> The first official drug court was established in Florida in 1989.<sup>211</sup> In 2004, there were over 1600 drug treatment courts in the United States.<sup>212</sup> Such courts embrace the concept that addiction is a disease and attempt to place drug-addicted offenders into a treatment program.<sup>213</sup> While this is certainly a better approach to drug use than a purely criminal model, it does not address the unique case of drug use during pregnancy. In most cases where women are arrested for drug use during pregnancy, the drug use is not incidental—it is actually the “crime.” That is, the woman is being brought on criminal neglect, child abuse, manslaughter, or even murder charges merely due to the fact that she used drugs during pregnancy.<sup>214</sup> Therefore, although laudable, drug courts are not an appropriate method to deal with the issue of drug use during pregnancy.

Additionally, even if it is not possible to “cure” or even stop pregnant women from drinking or using alcohol, there are steps that can be taken to reduce the harm of such use. For example, improving the nutritional status of these women has been shown to result in better outcomes for the babies these

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204. *Id.* at 322.

205. *Id.* at 318.

206. Schroedel & Fiber, *supra* note 80, at 225.

207. *Id.*

208. *Id.*

209. *Id.*

210. Hora & Stalcup, *supra* note 36, at 725.

211. *Id.*

212. *Id.*

213. *Id.*

214. See Fentiman, *Perfect Mother*, *supra* note 11, at 398–408.

women are carrying.<sup>215</sup> To reduce harm, women must be provided with education about how to best take care of themselves and their children, even when facing addiction issues.<sup>216</sup> In order to be successful, such topics require sensitivity and trust.<sup>217</sup> A public health approach requires a nonjudgmental, respectful attitude towards women who may be using drugs or alcohol during their pregnancy.<sup>218</sup> Both governmental and non-governmental community-based organizations should aim to work together to reduce harm in these situations.

Food for Thought, a community-based project in Saskatchewan, Canada, funded by Canada's Prenatal Nutrition Program,<sup>219</sup> is a good example of how community and government efforts may aid in harm reduction. Food for Thought is designed "to assist low income, high-risk pre- and post-natal women to achieve an optimal level of health."<sup>220</sup> It works with several organizations, including an inner-city health clinic, social services, addiction services, and a pregnancy outreach program to help achieve this goal.<sup>221</sup> They have several community sites and work with women who are pregnant and mothers whose children are less than six months of age.<sup>222</sup> Food for Thought provides transportation, on-site childcare, and afternoon sessions to help women.<sup>223</sup> Such sessions include a nurse, a nutritionist, and past graduates ("peer leaders") of the program.<sup>224</sup> Even if these women do not stop drinking or using drugs during pregnancy, they are offered support and education about prenatal care and nutrition.<sup>225</sup> These types of efforts are necessary on a large scale to reduce harm. There are some reports of smaller scale efforts in communities in the United States to help pregnant women seek help for drug addiction.<sup>226</sup>

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215. CAN. CTR. ON SUBSTANCE ABUSE, RESPECT IS KEY, *supra* note 201, at 2.

216. *Id.*

217. Tatarsky, *supra* note 193, at 251-53. See, e.g., CAN. CTR. ON SUBSTANCE ABUSE, NURTURING CHANGE: WORKING EFFECTIVELY WITH HIGH RISK WOMEN AND AFFECTED CHILDREN TO PREVENT AND REDUCE HARMS ASSOCIATED WITH FASD 18 (2004), available at <http://www.hcip-bc.org/readings/documents/NurturingChangeFinal-GR1.pdf> [hereinafter CAN. CTR. ON SUBSTANCE ABUSE, NURTURING CHANGE] (noting that in order to assist pregnant mothers with substance abuse problems a trusting relationship must be formed with the mother).

218. See CAN. CTR. ON SUBSTANCE ABUSE, NURTURING CHANGE, *supra* note 217 at 17.

219. CAN. CTR. ON SUBSTANCE ABUSE, RESPECT IS KEY, *supra* note 201, at 1.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 3. Furthermore, the more time mothers spend at these community, the less time they will be alone and possibly engaging in addictive behavior. As one of the employees for Food for Thought puts it, "When someone [is] with us for 2 ½ hours in an afternoon, I [know] for a fact that they didn't drink during that period. *Id.* at 2.

226. See, e.g., Sarah C. M. Roberts & Amani Nuru-Jeter, *Women's Perspectives on Screening for Alcohol and Drug Use in Prenatal Care*, 20 WOMENS' HEALTH ISSUES 193 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2869475/> (discussing a

However, these efforts are not on a macro level. These types of harm reduction endeavors need to become more commonplace for a public health approach to drug use during pregnancy to succeed.

In an ideal harm reduction model, legislation would be enacted to allow for the treatment of drug addiction during pregnancy without punitive measures. This would involve removing legal obstacles that drug-abusing women may face in terms of treatment. This may include addressing the issue of child custody. Some have suggested that creating family drug courts that would allow a woman to keep her children as long as she is attending treatment and testing clean may reduce harm.<sup>227</sup> Under a harm reduction approach, judges and prosecutors would not punish women for suffering from drug addiction while pregnant by incarcerating them or removing their children from them without other proof of neglect or harm. Ideally, women's drug addiction would be dealt with in the medical and public health realm.

*E. Using Public Health Ethics to Determine an Appropriate Policy Related to Drug Use During Pregnancy*

Despite the lack of evidence to support it, certain criminal prosecutors still believe that the policy of charging pregnant women for drug use advances public health by deterring drug use during pregnancy.<sup>228</sup> Examining this issue using public health ethics may contradict this assertion. According to accepted public health ethics, a public health policy must have proof that moral considerations, such as protecting privacy, avoiding harms, or promoting autonomy, need to be violated to achieve a public health goal.<sup>229</sup> Additionally, if there are two competing policies that provide the same public health benefit, policymakers should choose the one that infringes least upon those moral considerations.<sup>230</sup> This theory is known as the least infringement principle.<sup>231</sup> Thus, looking through a public health lens, a policy of arresting a woman for evidence of drug use during pregnancy would only be valid if it achieved the public health goal sought and there were no other similar competing policies that would cause less harm.<sup>232</sup>

When examining the issue through this paradigm, several flaws in the policy of criminalization become apparent. First, there is no evidence to

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study related to whether pregnant women trust the medical system enough to seek aid for their addictions).

227. Lester et al., *supra* note 18, at 26-30.

228. Fentiman, *Rethinking Addiction*, *supra* note 2, at 239.

229. See James F. Childress et al., *Public Health Ethics: Mapping the Terrain*, 30 J.L. MED. & ETHICS 170, 171-73 (2002) (citing additional moral considerations such as avoiding, preventing, and removing harms, producing the maximal balance of benefits over harms and other costs distributing benefits and burdens fairly).

230. *Id.* at 173.

231. *Id.*

232. *Id.*

suggest that targeting women who use drugs during pregnancy prevents such use, protects children, or serves any other public health purpose.<sup>233</sup> Secondly, there is evidence that such targeting actually prevents pregnant women from seeking prenatal care or drug treatment.<sup>234</sup> Thus, under this framework, the policy of prosecuting women due to their drug use during pregnancy is invalid. It infringes upon moral considerations without showing any public health result. "A policy that infringes one or more general moral considerations in the name of public health but has little chance of realizing its goal is ethically unjustified."<sup>235</sup> If it is not necessary to infringe upon a general moral consideration to implement a public health policy, one should adopt the alternative strategy that is "less morally troubling."<sup>236</sup> Here, under a public health approach, it appears that the policy of offering treatment and harm reduction offers a plausible alternative.

Under a public health based policy to drug use, legislators may need to advocate for legislation that requires more than a positive drug test to have a woman's children taken away and legislation that provides more drug treatment facilities aimed at women.<sup>237</sup> Prosecutors and judges must realize that throwing a pregnant woman or new mother in jail due to proof of her illegal drug use may not help her or her baby. Rather, sentences that allow for effective treatment may be necessary. To achieve this, a public health based approach must also allow for education of judges and prosecutors. Many judges and prosecutors honestly believe they are helping families and babies and even women themselves by arresting and incarcerating women who use drugs during their pregnancy. Just as education is needed in schools to help prevent drug use, education is needed for decision makers in the legal system to understand this as a public health problem that requires a public health based solution, not a punitive solution.

#### F. *Limitations of a Public Health Based Approach*

Although there are upsides to a public health based approach to drug use during pregnancy, it is necessary to acknowledge the limitations of such an approach. First, unfortunately, state and local budgets are tight,<sup>238</sup> and the programs suggested would likely require increased public health funding focusing on drug and alcohol abuse prevention and prenatal education. To move towards a public health approach to drug use during pregnancy, the priorities of the national and state governments towards drug use must change

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233. Fentiman, *Perfect Mother*, *supra* note 11, at 409-10.

234. Fentiman, *Rethinking Addiction*, *supra* note 2, at 239-40.

235. See Chidress et al., *supra* note 229, at 173.

236. *Id.*

237. See Steverson & Rieckmann, *supra* note 113, at 342-44.

238. NICHOLAS JOHNSON ET AL., CTR. ON BUDGET AND POL'Y PRIORITIES, AN UPDATE ON STATE BUDGET CUTS: AT LEAST 46 STATES HAVE IMPOSED CUTS THAT HURT VULNERABLE RESIDENTS AND THE ECONOMY (2011), *available at* <http://www.cbpp.org/cms/index.cfm?fa=view&id=1214>.

from enforcement to treatment and prevention. For example, the Office of National Drug Control Policy has stated, “[f]ederal spending on drug control has increased from 1.5 billion in 1981 to 19.2 billion in 2002.”<sup>239</sup> However, the percentage of that budget devoted to drug abuse prevention, drug abuse treatment, and prevention and treatment research has remained the same.<sup>240</sup> If we are to focus on public health measures such as prevention and treatment, an increased proportion of that budget needs to go towards these goals. There are no easy answers when it comes to prevention. Even though politicians pay lip service to adopting a public health based approach to drug use, they shy away from decriminalization to avoid looking “soft on crime.”<sup>241</sup>

One of the key problems to a public health based approach is that prevention takes time.<sup>242</sup> Long-term policies that may have great public health benefits may not be glamorous or politically beneficial. For example, an elected official may be more likely to be re-elected for being “hard on drugs,” rather than for implementing mentorship and educational programs that may affect drug use years in the future. It may be easier for a politician to brag about how he or she throws drug-abusing women in prison than to show how he or she has spent limited resources implementing effective drug treatment and prevention programs. This is a realistic and practical critique of a public health based approach.

Additionally, even if a public health based approach emphasizes treatment, we need to recognize that there are barriers to drug treatment. A key barrier, as mentioned earlier, is that when a woman is able to get into a drug treatment facility, she may be forced to give up custody of her children, either to relatives or into foster care. A public health approach must recognize this. Definitions of neglect or abuse must be changed to reflect a public health approach, and regulations must be amended so that it is no longer assumed that addicted women are unable to take care of their children. Even still, there may be reluctance for poor, minority women to seek treatment due to their general distrust of the criminal law and even public health system.<sup>243</sup>

In an ideal world, a woman would get proper prenatal care, be educated about the effects of her drug use on her health and the health of her fetus, and

239. Lester et al., *supra* note 18, at 3.

240. *Id.* (noting that only 10 percent of the budget is spent on research and 15 percent of the budget is spent on treatment).

241. See Jacob Sullum, *Obama Supports a “Public Health” Approach to Drugs But Only in Theory*, REASON, July 27, 2011, <http://reason.com/blog/2011/07/27/obama-supports-a-public-health>. In a recent town hall meeting, President Obama spoke about his commitment to a public health based approach to drug policy. *Id.* However, he specifically said he did not support decriminalization. He stated that “we need to have an approach that emphasizes prevention, treatment, a public health model for reducing drug use in our country. We’ve got to put more resources into that. . . . [A]m I willing to pursue a decriminalization strategy as an approach? No.” *Id.*

242. See NAT’L INST. ON DRUG ABUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS 20-22 (2006), available at [http://www.nida.nih.gov/PDF/PODAT\\_CJ/PODAT\\_CJ.pdf](http://www.nida.nih.gov/PDF/PODAT_CJ/PODAT_CJ.pdf).

243. POOLE, *supra* note 176, at 39.



be readily admitted into a drug treatment facility that would allow her to keep her child with her. However, there is a lack of drug treatment facilities nationwide and a small minority of drug treatment programs in the United States focus on the unique needs of pregnant women.<sup>244</sup> This dearth of resources would be addressed under a public health model.

Another potential concern with a public health based approach is whether it will adequately safeguard women's privacy. The evidence-based research studies, surveillance, and other public health efforts discussed earlier have the potential to infringe upon women's privacy.<sup>245</sup> There must be privacy safeguards in place to ensure that accurate data may be collected, without making these women subject to criminal prosecutions due to their participation in such research and surveillance efforts. This is especially important when dealing with minorities or other populations already distrustful of public health and medical officials and law enforcement officials.

#### CONCLUSION

This article attempted to methodologically critique the punitive treatment of drug abuse during pregnancy and advocate for a public health based approach, rather than a criminal law based approach. The article then detailed what such a public health law approach would look like, emphasizing harm reduction, prevention, public health law research, and treatment. Laws that criminalize women for public health problems such as drug addiction may have the unintended consequence of preventing women from seeking prenatal care or aid to overcome such problems. Such laws, instead of protecting the fetal victim, may work to encourage women to avoid prenatal care and even terminate their pregnancy in certain circumstances.

Despite a body of scholarship critiquing criminalization of pregnant women for public health problems, such as drug addiction, prosecutors continue the practice of penalizing pregnant mothers for illicit drug use. Additionally, states continue to pass laws that seek to penalize pregnant women in the name of fetal rights. This article has critiqued such an approach and attempted to analyze this public health issue using public health methodologies. Such an approach may reduce harm that could occur due to drug use during pregnancy in a more effective and just manner, as compared to criminalization. Many scientists note that the harm caused by drug use during pregnancy is "almost entirely preventable."<sup>246</sup> One of the main problems with the current criminalization approach is that the focus is on punishing such use, not minimizing the impact of drug use during pregnancy. The punitive model harms the woman and harms the infant because it does nothing to improve her health outcomes or the infant's health outcomes, and may even encourage the

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244. See Fentiman, *Perfect Mother*, *supra* note 11, at 463.

245. See Michael A. Stoto, *Public Health Surveillance in the Twenty-First Century: Achieving Population Health Goals While Protecting Individuals' Privacy and Confidentiality*, 96 GEO. L.J. 703, 704 (2008).

246. See, e.g., Reynolds, *supra* note 74, at 21.

woman to terminate the pregnancy. A public health model is a win-win with its potential to improve both the woman's and infant's health outcomes.<sup>247</sup>

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247. Peter D. Jacobson et al., *Reciprocal Obligations: Managing Policy Responses to Prenatal Substance Exposure*, 81 *MILBANK Q.*, 475, 480 (2003).